IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JAIPUR BENCH, JAIPUR

O R D E R

S.B. Civil Misc. Stay Application No.2610/2001

In

S.B. Civil Second Appeal No.469 Of 2001

Rameshwar Lal Vs. Pukhraj & Others.

Date Of Order ::: 21.11.2006.

Hon'ble Mr. Narendra Kumar Jain J.

Mr. Anurag Agarwal, Counsel for defendant-appellant
Mr. R.K. Agarwal,, Counsel for plaintiff-respondents

By the Court :

Heard learned counsel for both the parties on the stay application under Order 41 Rule 5 read with Section 151 of the Code of Civil Procedure, 1908.

Learned counsel for the defendant-appellant submits that the appeal has already been admitted, therefore, the eviction decree passed, against the appellant, be stayed, during the pendency of the second appeal. So far as the mesne profit of the rented shop

is concerned, he contended that at present the market rate of the monthly rent of the disputed shop is approximately Rs.300/-, therefore, the mesne-profit be fixed accordingly.

Per contra, learned counsel for the plaintiff-respondents contended that the First Appellate court recorded a finding in respect of the reasonable bona-fide necessity of the disputed shop in his favour and passed a decree of eviction, therefore, the stay application be dismissed and in case any stay order is passed on eviction decree, then at least the mesne profit as per prevalent market rate of the monthly rent of the premises may be passed. He further contended that at present market rate of the monthly rent of the disputed shop is approximately Rs.1500/-, therefore, the mesne profit be fixed accordingly.

The Hon'ble Supreme Court in the case of **Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd.,** (2005) 1 SCC 705, considered the jurisdiction of the appellate Court while passing order of stay under Order 41 Rule 5 of the C.P.C., and held that the appellate court has jurisdiction to put the applicant under Order 41 Rule 5 of the C.P.C., on such reasonable terms as

would, in its opinion, reasonable compensate the decree-holder for loss occasioned by delay in execution of the decree by grant of stay order, while passing the stay order in his favour, in the event of the appeal being dismissed.

The Apex Court in the above referred case held as under :

> “19. To sum up, our conclusions are :
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> 1. While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would, in its opinion, reasonable compensate the decree-holder for loss occasioned by delay in execution of the decree by grant of stay order, while passing the stay order in his favour, in the event of the appeal being dismissed and insofar as those proceedings are concerned. Such terms, needless to say, shall be reasonable.
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> 2. In case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (1) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of

the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.

3. The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date".

The Hon'ble Supreme Court again in **Anderson Wright & Company Vs. Amar Nath Roy,** 2005 DNJ (SC) 562, while considering its earlier judgment in Atma Ram Properties (P) Limited's case (Supra) reiterated the same proposition of law.

The above referred Atma Ram Properties (P) Limited's case (supra) has further been followed by three-Judges Bench of the Hon'ble Apex Court in the case of **Achal Misra Vs. Rama Shanker Singh & Others** (2005) 5 SCC 531 and **Crompton Greaves Limited Vs. State of Maharashtra** (2005) 11 SCC 547.

This Court in **Mandan Bansal Vs. Ramnarayan**

Sharma, reported in R.L.R. 2006 (1) 733, considered the similar point and observed as under :

> "...the criteria for admission of the appeal are altogether different than what adopted at the time of hearing of the appeal for final disposal. Even if the appeal is admitted by the first appellate Court being a statutory appeal or second appeal as substantial question of law arises then it does not mean that it will be allowed finally. Once appeal is admitted then it is commonly known, that it goes for hearing in due course and due to long list of pending old appeals, it takes quite considerable long time in its final disposal. In such circumstances a decree holder is not only deprived of getting the possession of the rented premises but also deprived of the monthly rent or the mesne profit or compensation for use and occupation of the rented premises as the market value of the shop or the prevalent rent of the premises. The Order 41 Rule 5 of the CPC gives jurisdiction to the appellate Court to pass interim stay staying the execution of the decree but the interim stay order is required to be passed reasonably and while doing so the interest of decree-holder is also required to be protected."

I have considered the submissions of learned counsel for both the parties. The rented shop was let out about 40 years back and at present appellant is

making the payment of the monthly rent at the rate of Rs.94/-. The statement of the defendant was recorded in the year 1995, wherein he has stated that he took the rented shop on rent about 33 years ago. Admittedly, it is a commercial shop, which is situated in the city of Madangarh (Kishangarh).

After considering all the facts and circumstances of the present case as well as the rival submissions of the learned counsel for both the parties, I am of the view that once the second appeal is admitted, the eviction decree should be stayed and accordingly I stay the decree of eviction passed against the appellant by First Appellate Court during the pendency of the second appeal, on the following terms and conditions;-

1. That the defendant-appellant shall pay/deposit the arrears of monthly mesne profit till 31st of October 2006, as per direction of the Courts below within a period of one month and shall further continue to pay/deposit the monthly mesne profit at the rate of Rs.1000/- (Rupees one thousand only) per month, with effect from 1st of November 2006 by 15th day

of each succeeding month, in the bank account of the plaintiff-respondents, the details of which will be furnished by the plaintiff-respondents within a period of two weeks to the defendant-appellant or his counsel. In case the details of the bank account are not furnished, then the defendant-appellant may deposit the amount, in question, in the Lower Court itself.

It is made clear that in case all the arrears of mesne profit, as per direction of the Courts below, are not deposited within a period of one month and the future mesne profit, as directed above, is not deposited with effect from 01st of November 2006, for consecutive two months, then it will be open for the plaintiff-respondents to get the decree, passed in their favour by the Courts below, executed even during the pendency of this second appeal.

The stay application accordingly stands disposed of.

(Narendra Kumar Jain) J.

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